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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 374

ROSS C. ADAMS, Receiver of the Farmers National Bank of Pekin, Illinois,
Petitioner,

vs.

EDWIN V. CHAMPION, Trustee in Bankruptcy of John Fitzgerald, Bankrupt,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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ARGUMENT.

A. Both the District Court and the Circuit Court of Appeals found the facts in the same way. Therefore, the facts in this Court are not open to question.

In accordance with Equity Rule 70½, the District Court made findings of fact as follows:

> "(1) The Court finds that these four items are those above set forth which aggregate the principal sum of $8870.07.

"(2) The Court further finds that the Bank of the Receiver received the four items of collateral above described (Graff Item $3183.78; Sommer Item $1058.96; Bank Stock Item $3030.00; Veesaert Item $1597.31) as an unlawful and recoverable preference; that the several elements were converted into cash and used by the Receiver's Bank as its own.

"(3) The Court further finds that the said several items are and were impressed with a trust for the benefit of the creditors of John Fitzgerald, Bankrupt.

"(4) The Court further finds that shortly after receiving the collaterals in question the defendant Bank converted them into cash and treated them as such and as its own.

"(5) The Court further finds that on January 7, 1932, when the said defendant Bank closed, it had on hand in cash and cash items $36,054.76, and that this fund afterwards went into the hands of the Receiver; that the least amount in cash and cash items in the defendant Bank during the period February 5, 1929, to the close of business on January 7, 1932, was $30,548.61; that the defendant Bank by collecting notes and bonds belonging to the plaintiff as Trustee in Bankruptcy, and the sale of ten shares of stock, without the knowledge or consent of the Trustee, held the proceeds of such collections and sale, amounting to $8870.07, as a Trustee *ex maleficio,* and that the said funds were in the funds on hand at the time of the closing of the Bank, and that plaintiff is entitled to have said claim for $8870.07 allowed as a priority." (R. p. 67).

Of the findings of the District Court, the Court of Appeals in its Opinion said:

> "The Court's findings which are material to the questions here presented are substantially as follows: That the bank received the four items of collateral as an unlawful and recoverable preference and treated them as cash and shortly thereafter converted them into cash which was intermingled with the cash of the bank and treated by it as its own; that when the Bank closed it had on hand in cash and cash items, $36,-054.76, which afterwards went into the hands of the Receiver; that the least amount in cash and cash items in the Bank during the period from February 5, 1929, to the close of the business on January 7, 1932, was $30,548.61; that the Bank by collecting bankrupt's notes and bonds and by a sale of his bank stock without the knowledge or consent of the Trustee, held the proceeds of such collections and sale amounting to $8,-870.07, as a Trustee *ex maleficio;* and that said funds were in the possession of the bank when it closed." (R. p. 84).

The Court of Appeals held that the District Court properly found that the Bank held the funds as a Trustee *ex maleficio.* (R. pps. 84, 85). The correctness of this holding is admitted by the petitioner in this Court. (See Summary of Argument, Brief p. 11).

With regard to augmentation and tracing of funds, the Court of Appeals said:

> "We are convinced that the Bank's assets were augmented by, and to the extent of, the proceeds of the collateral, and that those proceeds have in law been traced into the Receiver's hands." (R. p. 87).

It will thus be seen that the findings of fact in both the District Court and the Court of Appeals are the same.

At various places in petitioner's Brief and Petition the three elements necessary to establish his claim, in order to have a preferred claim allowed against an insolvent National Bank, are stated as follows:

> "(1) The relationship is that of Trustee and *cestui que trust;*
>
> "(2) The transaction with the claimant resulted in augmentation or increase of the assets of the insolvent by the property of the claimant or the proceeds thereof in the form of actual cash or other tangible assets;
>
> "(3) That such property or assets of the claimant, or other property identified as being in lieu thereof, can be traced into the hands of the Receiver taking over the assets of the insolvent at the time of suspension." (See Petition and Brief, pps. 7, 11, 12).

A fourth element is also stated by petitioner as follows:

> "(4) That the burden of showing the facts of augmentation and tracing is upon the preferred claimant." (Petition p. 7).

This, however, is not an element of recovery at all, but simply a rule of evidence bearing upon the burden of proof.

Petitioner's counsel admits that when these three elements of recovery are established by a claimant he is entitled to have a priority claim allowed. Aside from the admission, this is undoubtedly the law. See *Schuyler* v. *Littlefield,* 232 U. S. 710; *Connolly* v. *Lang,* 68 Fed. (2d) 199, 201.

In the case of *Page* v. *Arkansas Natural Gas Corporation*, 286 U. S. 269, the first paragraph of the syllabus is as follows:

> "Findings of fact in which both Courts Below concur will not be reviewed by the Supreme Court of the United States."

On this subject the Court, on page 271, said:

> "Many and complicated questions of fact are involved and were argued here, but as they have been found in favor of the respondent by both Courts Below, we do not review them."

See also *U. S. Trustee, et al.* v. *McGowan, et al.* and *U. S.* v. *Bakers Bay Fish Co., et al.*, 290 U. S. 592.

In the instant case the facts having been found by both of the Lower Courts in favor of the respondent, and these facts being admitted by the petitioner to be sufficient to warrant a recovery by the respondent, we take it that this Court will not grant a writ of certiorari.

B. The merits.

On the merits of the case, we refer the Court to the case of *Schumacher* v. *Harriett*, 52 Fed. (2d) 817, the Opinion in the instant case (R. p. 82), and the Answer of the Appellee to the petition for Rehearing in the Court of Appeals. (R. p. 10).

Respectfully submitted,

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